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June 14, 2010

**By EMAIL**

Native American Heritage Commission

Re: Viejas Additional Submission for June 17, 2010, Special Hearing

Dear Hon. Chairman Ramos, Commissioners and Staff:

This letter is to provide additional support for the request of the Viejas Band of Kumeyaay Indians (Viejas) for the Native American Heritage Commission (NAHC or Commission) to apply Public Resources Code (PRC) sections 5097.5, 5097.94(g) and 5097.97 to a property owned by the Padre Dam Municipal Water District (District) near Lakeside in San Diego County, California.

Submitted herewith are additional documents in support of Viejas' request:

- T: Technical Points Rebuttal of District's April 5, 2010 and May 7, 2010 Submissions to the NAHC and Other Material;
- U: 1976 Summary Digest Ch. 1332 (AB 4239) Knox. Native American heritage;
- V: NAHC Hearing Transcript – April 6, 2010;
- W: Carmen Lucas Letter to NAHC – April 22, 2010;
- X: Rebecca Apple Email to Courtney Coyle – May 14, 2010;
- Y: James Gilpin Email to Kimberly Mettler – May 26, 2010;
- Z: *Viejas Band of Kumeyaay Indians v. Padre Dam Municipal Water District* - Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief – June 1, 2010;
- AA: Carmen Lucas Declaration – June 6, 2010;
- BB: Frank Brown Second Declaration – June 5, 2010;
- CC: Sketch Maps by Frank Brown Indicating Recent Finds;
- DD: Kumeyaay Cultural Repatriation Committee Letter to Padre Dam Municipal Water District – June 2, 2010;
- EE: Steve Banegas Declaration – May 10, 2010;
- FF: Forensic Anthropology Report - Padre Dam Site by Madeleine J. Hinkes, PhD – June 7, 2010;
- GG: *Viejas Band of Kumeyaay Indians v. Padre Dam Municipal Water District* - Memorandum of Points and Authorities In Support of Ex Parte Application for Temporary Restraining Order – June 1, 2010;

- HH: *Viejas Band of Kumeeyaay Indians v. Padre Dam Municipal Water District* - Petitioner's Objections to Evidence Filed by Respondent in Opposition to Ex Parte Motion for Temporary Restraining Order - June 7, 2010;  
II: Pictures of Blasting at Subject Site (February 2010); and  
JJ: *Viejas Band of Kumeeyaay Indians v. Padre Dam Municipal Water District* - [Proposed] Temporary Restraining Order - June 11, 2010.

Viejas anticipates submitting some additional information, that is not yet available, at the time of the hearing on this matter, including: Viejas archaeologist's initial report; a report of the results, if any, of mediation by the NAHC pursuant to PRC Section 5097.97(k) of disputes between Viejas (as MLD) and the District; and any mitigation measures recommended from Viejas (as MLD) and the mediation as provided for by PRC section 5097.98(c).

We trust that the supplemental information attached to this email, when considered together with the NAHC Staff report and the documents, testimony and other evidence previously provided to the NAHC, will provide additional evidence for, among other things, the findings the Commission will consider.

We thank the Commission for its consideration of this evidence and its efforts to appropriately protect a Native American sanctified cemetery and ceremonial site.

Very truly yours,



Kimberly R. Mettler, Esq.  
Viejas Office of Legal Affairs  
VIEJAS BAND OF KUMEYAAY INDIANS



Courtney Ann Coyle, Esq.  
Law Office of Courtney Ann Coyle

Attachments T through JJ

cc: Larry Myers



**TECHNICAL POINTS REBUTTAL OF DISTRICT'S APRIL 5, 2010 and  
MAY 7, 2010 SUBMISSIONS TO THE NAHC AND OTHER MATERIAL**

**June 14, 2010**

1. There is no requirement in law or practice that a site needs to be previously identified to be acknowledged by the Commission as a sanctified cemetery or ceremonial place under the PRC.  
(April 5, pages 2-3)
  - *Quechan Indian Tribe v. United States* case, cited by the District, actually *supports* the Tribe's view that previously unidentified or listed sacred sites are worthy of protection;
  - This view also is consistent with CEQA, where significance under CEQA is NOT just for properties already on the California or National Registers, and is also consistent with national historic preservation laws and best practices;
  - The District's citation to legislative history from 1976 to support the implication that somehow only properties designated, identified or catalogued by a certain date could be protected is not supported upon review of the cited document itself, which is a summary digest merely outlining the provisions of the original bill.
2. It does not appear the Mitigation Monitoring and Reporting Program (MMRP) is being followed (April 5, page 5) or that any new remains have been encountered during the construction phase.

- Suspected human bone, suspected burnt soil and grave goods have been found in June 2010 within the area the Judge allowed for construction;
- The principal investigator testified that three levels of data recovery were done without water screening, indicating that human remains in the initial phases of data recovery could have gone undetected;
- Because no additional wet screening occurred during construction, it is highly likely that fragmented human remains have gone undetected and been hauled offsite to the soil storage location;
- The District's letter of March 25, 2010 does not clearly indicate who performed the field identification of the bone discovered during the construction phase, whether they were qualified to render a tentative identification, and whether the Coroner was in fact called even though such a call is required by conditions of project approval (MND, CULT-8) and state law;
- No daily logs from the Native and Archaeological Monitors during project development have been provided to us; they were supposed to be kept as a condition of project approval (MND, CULT-3);
- The District did not address the discovery of unmarked cemeteries in its MND despite being asked to do so by the NAHC in its September 29, 2008 comment letter on the MND;
- The District is now doing a different project than the one in the project description in the MND, as it is

exporting soils, contrary to the terms of the MND (MND, CULT- 11); and

- Viejas, as the MLD, has made recommendations on qualified monitors, monitoring and soils protocol, but these are still in negotiation.
3. Mr. Cuero's unsigned (or undated) declaration is insufficient as a matter of law and cannot be relied upon (April 5, pages 5 and 14) because it:
- Provides no foundation that he is qualified to render an opinion as to cemeteries that might be sanctified within the Viejas/Sycuan/Barona Bands' territory;
  - Does not say he reviewed any of the project reports, talked to the prior monitors or is qualified to render opinions on bone identification; and
  - Does not say how he would be able to identify fragmented human remains at this particular site absent the water screening protocol used in data recovery.
4. Not all archaeologists agree that the findings at the site are inconsistent with a burial (April 5, pages 5 and 14)
- Archaeologist Linda Akyuz wrote in the 2007 official archaeological site form filed with CHRIS that the amount of pottery could indicate burials;
  - Archaeologist Clint Linton is of the opinion it is a burial;
  - It would be interesting to learn if archaeologists Cook and Hale are both of the opinion, at this time – not just

before or during data recovery - that there is no cemetery, burial ground or ceremonial site;

- Even the District's "independent" archaeology expert Trish Fernandez did not testify that the property was not a burial or ceremonial site, but rather that she felt the reports met current archaeological standards; however, archaeological standards are not directly at issue here; and
- No tribal cultural resources evaluation analysis or report was done on the project so the environmental document was flawed and cannot be relied upon.

5. Simply retaining Native American monitors does not ensure that any cultural resources uncovered will be treated appropriately (April 5, page 8)

- The District essentially ignored the recommendations of its three Native monitors: tribal cultural sites were not avoided, 100% data recovery with water screening, etc., did NOT occur at the property; and no explanation is given in the District's letter for its failure to follow the monitors' recommendations from 2007-2009.

6. In its discussion of onsite project alternatives, the District asserts that it unilaterally determined – without consulting Native monitors or other tribal representatives - that only those alternatives that 100% avoid "rock features" were worth pursuing (page 8)

- This is a faulty alternatives analysis, because any alternative which could have reduced impacts to the

significant resources (midden, artifacts, etc.) should have been discussed with tribal representatives (such as KCRC) and appeared in the project's environmental documentation, but they were not;

- No evidence has been presented that the District involved KCRC in the CEQA process for its project, instead only appearing before it *after* project approval and *after* human remains had been impacted.

7. While CEQA compliance is not directly before the Commission, the District misstates the "new information of substantial importance" provision of CEQA, the statute of limitations trigger, the purpose of alternatives analysis and the nature of the PRC findings (April 5, pages 9-10, 16-17)

- That multiple human remains, grave goods and an "unparalleled" high density of broken pottery was found after project approval, during data recovery, is precisely the type of new information that should have triggered subsequent environmental review under CEQA to determine whether the project would have: significant effects not previously discussed, increased severity of impacts, mitigation measures or alternatives previously found infeasible that might be feasible or could reduce impacts, etc., pursuant to CEQA Guidelines section 15162;
- Viejas only became aware of this changed circumstance after the Viejas Monitor's site visit in December 2009, triggering a 180-day statute of limitations, which has not yet run;

- That a Petitioner should not be held to a strict exhaustion standard if the environmental documents were so misleading as to not have put it or the public on notice of potential effects;
  - That the District performed an alternatives analysis outside of its MND does not support the District's use of an MND, but rather indicates that an EIR should have been done from the outset;
  - There is no requirement that the instant PRC findings be performed as part of the original CEQA process, particularly where information stemming from post approval data recovery provides evidence of places that fall under NAHC jurisdiction;
  - The failure to perform avoidance analysis in its environmental document appears inconsistent with the court's ruling in *City of Santa Monica et al v. City of Los Angeles et al* (2007) Court of Appeal, 2nd District ("Playa Vista"), (LA required to revise its EIR after project work commenced because applicant failed to properly study avoidance of cultural resources on the site).
8. The District complains that the MLD was transferred from the Kumeyaay consortium to a specific Kumeyaay band (April 5, page 13)
- However, the District itself acknowledges that it agreed in its mitigation measures to coordinate with *any future MLD* designated by the NAHC (April 5, page 10);

- The District was therefore on notice that additional or subsequent MLDs could be named;
- KCRC was created to deal with repatriation of historically excavated remains and accidental discoveries, not excavation of burial grounds under CEQA;
- The MLD "transfer" letter from KCRC states the reason the MLD was transferred was for the "Viejas Band to conduct further review and determination for the site," therefore the reason for the transfer is not unknown, contrary to the District's assertions;
- The District's letter says an "agreement" was reached with KCRC to allow data recovery work after human remains were found implying that somehow KCRC supported site destruction (April 5, page 11), yet the Data Recovery Report itself (page 97) called it simply an "arrangement – until all fieldwork was completed," presumably done to allow KCRC to decide how to best proceed once it had more information;
- KCRC has recently stated it feels that the District gave insufficient and misleading information to it. KCRC also said that it did not realize the damage being done by the project to the site until they did a site visit in December 2009;
- No evidence of a pre-excavation agreement, data recovery mitigation measures and no written agreement on MLD protocols between KCRC and the District have been presented;

- Blasting of the milling feature was done after Viejas was the MLD, after Viejas had asked the District to stop work and without Viejas' consent; and
  - KCRC never "blessed" the project or the District; any prayer on the site was a prayer of forgiveness for what happens in these modern times and to try and release any lingering spirits.
9. The District mischaracterizes the nature of Viejas' concern in an unproductive and disrespectful manner (April 5, pages 13-15)
- While the District had voluntarily stopped work and four meetings have been held, it cannot be said that it timely complied with Viejas' requests for information, in some cases, taking several months (until after project construction commenced) to provide the MND, for example;
  - Incorrectly states that the majority of documents requested were not relevant, when in fact they were critical to the Tribe's ability to piece together what had occurred at the site, as this information was not otherwise available, particularly because only an MND and archaeological analysis – not an EIR and tribal cultural resource evaluation – were performed for the project;
  - Incorrectly states that Viejas has "no intention" of making recommendations, when in fact Viejas as recently as April 2, 2010, in written communications with the District, conveyed its understanding that the

parties were still compiling information in good faith about options and client interests;

- Incorrectly cites to the 48-hour provision of law instead of the provision dealing with multiple burials that specifically allows for an extended conferral period; and
- Characterizes the transfer of MLD as “posturing” instead of recognizing the self-determination of a tribal government.

10. Viejas strongly disagrees with the District’s assertion that “Even if the Commission now concludes that the Project Site is a sacred site, the impacts of the Project can be and have been mitigated.” (April 5, page 15)

- There are preservation in place mitigation measures that should be analyzed by the District in consultation with Viejas that have not been incorporated into the project;
- Viejas believes that the project, as currently proposed, includes significant and unmitigated direct and cumulative impacts to tribal cultural resources;
- The Commission may recommend additional mitigation measures, including avoidance; and
- In its letter to the District, KCRC stated that it was its intention “to preserve as much of this site as possible.”

11. The District complains that the NAHC staff should have made it aware of the District’s obligations under the PRC (April 5, page 17)

- The NAHC would not be able to function with its limited staff, if it were expected to do each project's PRC compliance throughout the state;
  - Ignorance of the law is no excuse, and the District had project-specific CRM consultants and attorneys to advise it throughout the life of the project;
  - There is no legal requirement for the NAHC to inform project proponents, and there is no administrative equitable estoppel of the NAHC's enforcement, particularly where doing so could nullify a strong public policy adopted for the benefit of the public;
  - In fact, NAHC's letter on the MND advised the District that: 1) the Sacred Lands File is not exhaustive, and local tribal contacts should be consulted from the NAHC-provided list, 2) the existence of tribal cultural resources may be known only to local tribes so they must be consulted, and 3) culturally-affiliated tribes may be the only source of information about tribal cultural resources - yet there is no evidence the District contacted the tribes on the list during the CEQA process or on any other aspect of the project.
12. The District asserts that the archaeologist for EDAW denied telling Native Monitor Carmen Lucas that EDAW made certain conclusions and recommendations for the property to the District during initial site review (April 5, page 18)
- However, the email referred to by the District in support of its assertion is not from Ms. Apple herself

but rather is between two ASM consultants who were not present at the time of the communication;

- The email is therefore hearsay and self-serving with no indicia of credibility;
- In either case, neither the District's letter nor the attached email refute that a recommendation was made by EDAW that the site should be avoided; and
- The District's explanation for the removal of EDAW as the cultural firm while retaining EDAW to draft the MND itself makes no sense if in fact impacts to the site were insignificant.

13. The District incorrectly asserts that no entity recommended the District move to another site due to unmitigable resources (April 5, page 18)

- The District ignored the recommendations - from 2007 - prior to approval of the MND - of two qualified tribal monitors that the site should be avoided.
- It was the District's duty (which it failed to meet) to provide the Tribes and the public material information in the CEQA process so that such a recommendation might be forthcoming. Instead, the District failed to provide information, and identified the effect on human burial as not significant.

14. The District has given the Commission, and otherwise made public, confidential information, provided from settlement discussions (April 5, exhibit CC and page 20)

- Normally, we would be constrained in revealing the District's settlement communications, but since they

partially revealed such communications, we are no longer constrained from informing you the District's attorney represented they were considering redesigning the project on site or pursuing one of the offsite locations as recently as March 26, 2010, and has not informed Viejas of anything to the contrary in subsequent communications;

- If the Commission considers the information provided by the District, it should know the rest of the information so that it may consider the full range of mitigation options being discussed;
- On April 29, 2010, the parties met, and the District proposed features of an onsite redesign to avoid what it calls a "core area", but no specific project alternative design was offered, and in fact the District's attorney had sent Viejas a preliminary design from 2008 in preparation for the meeting that the District said at the meeting was not under consideration;
- Based on this, and that: 1) fragmented human remains could occur throughout the site deposit, within and outside the core area (Data Recovery Report, pages vii and 89), 2) that fifty percent of the identified human remains came from one of the two test units *outside* of the core area (Data Recovery Report, page 35), 3) that additional human remains and artifacts may have been spread across the property during construction activities (Carmen Lucas and second Frank Brown declarations), and 4) that the District has not

responded to Viejas' and the NAHC's requests to do a tribal cultural resources evaluation which might assist Viejas in assessing onsite alternatives, Viejas had to request that the District find an offsite alternative; and

- The District's principal investigator acknowledges that it is known that the site extended into the adjacent road, trailer park and vacant land to the north, making a tribal cultural resources evaluation even more critical to understand the extent of the ancestral human remains and grave goods.

15. In subsequent communications, the District has stated that public interest and necessity required the project in this location asserting the need for redundant fire capacity.

- This was not part of the purpose and need for the project as stated in the MND (MND, page 6);
- The MND itself says that the District can meet current district wide demands without the project (MND, page 6);
- Any findings that may have been made were made for offsite easements pursuant to eminent domain law - not relative to the parcel in question and do not reflect a balancing of the project against its detrimental effects to a burial ground pursuant to requirements of the Public Resources Code;
- Even if the project were in the public interest, there is no evidence the project had to be located on this specific property to the exclusion of all others; and

- Alternatives were available on and off site, but not shared with tribes, the public or the NAHC.

**EXHIBIT U**

established by any existing state agency, and provide for exchange of recommendations between the state commission and other specified state agencies.

(14) Provide that the designation of a sensitive coastal resource area shall be recommended to the Legislature for designation as such by concurrent resolution, provide that if such resolution is not adopted within two years the area shall cease being a sensitive coastal resource area and prescribe procedure for legislative consideration.

(15) Provide that SB 1277 is not intended to authorize the taking or damaging of private property for public use without the payment of compensation therefor.

(16) Revise an exception to the requirement for a coastal development permit for urban land areas meeting specified conditions if the local agency so requests and the [state] \* commission makes requisite findings.

(17) Authorize a judicial procedure for removal of a local coastal program, or any portion thereof, or any coastal development permit application or an appeal therefrom from a regional commission to the state commission; and

(18) Revise the date by which a vested right not requiring approval for development may accrue from the date SB 1277 is chaptered to [January 1, 1977], and delete a provision that a vested right shall be deemed abandoned if construction of the exempted development has not in good faith been pursued within three years after a claim of exemption has been requested and approved; \*

(19) Would delete [Delete] \* authority of regional commissions to apply for and accept grants, appropriations, and contributions in any form; and

(20) Make various technical changes to SB 1277.

This bill would provide that it shall become effective [operative] \* only if SB 1277 is enacted.

#### Ch. 1328 (AB 4039) Enss. Native American heritage

Under existing law there is no governmental entity responsible for identifying and cataloging places of cultural significance to Native Americans.

This bill would create and empower a Native American Heritage Commission to accomplish that purpose. The bill would specify qualifications for membership, manner of appointment, reimbursement of expenses, and powers and duties of the commission generally.

The bill would after July 1, 1977, prohibit public agencies, with specified exceptions, and private parties using, occupying, or operating on public property from interfering with the free exercise or expression of Native American religion and from causing severe and irreparable damage to designated types of sacred sites, except on a clear and convincing showing that the public interest and necessity so require.

The bill would authorize the commission, upon making specified findings in accordance with specified procedures, to bring an action to prevent severe or irreparable damage to, or secure appropriate access for Native Americans to, such sites, and would direct the court, upon making specified findings, to issue an injunction, unless it finds, on clear and convincing evidence, that the public interest and necessity require otherwise.

The bill would authorize the commission to prepare an inventory of Native American sacred places located on public lands and require the commission to review current administrative and statutory protections accorded to such places and to report to the Legislature on specified matters by January 1, 1978.

The bill would appropriate \$50,000 for support of the commission, and would specify that there shall be no reimbursement of local agencies for costs incurred under the bill.

#### Ch. 1330 (AB 1346) Ingala. County transportation commissions

(1) Under existing law, there is no public entity designated as a county transportation commission.

The bill would create a county transportation commission in Los Angeles County, Orange County, Riverside County, and San Bernardino County to coordinate transit service, to approve public mass transit system and federal aid and state highway planning, and to designate the operators of transit guideway systems. The Los Angeles County Transportation Commission would be required to submit to the Legislature a progress report not later than July 1, 1977, and a final report with recommendations not later than February 1, 1978, on the transit situation in Los Angeles County.